

1 the admissibility decision would be made
2 today. So they are still offered in our
3 binders as exhibits from Defendants.

4 JUDGE SIPPEL: Oh. I see.

5 MS. WALLMAN: But as Mr. Rose just
6 said, if Your Honor's ruling extends to the
7 admissibility, the logic extends to the
8 admissibility, which we urge that it should,
9 we would withdraw 17 and 18 assuming that
10 Defendants' DVDs would also come out.

11 JUDGE SIPPEL: Well, I think I'm
12 going to -- Go ahead. Let me hear briefly on
13 this.

14 MR. COHEN: Your Honor, obviously
15 we think you should look at the program.

16 JUDGE SIPPEL: Obviously.

17 MR. COHEN: So we lost that.
18 Either you're going to look at or not look at
19 it. It's up to Your Honor. I mean that's why
20 we made the motion. We think it would be
21 informative for you. We understand that if
22 ours is coming in theirs are coming in. But

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1 we had the same understanding as Ms. Wallman
2 that you had not yet made the decision on
3 this.

4 JUDGE SIPPEL: Well, I'll rule
5 right now. There are no DVDs that have been
6 proffered in this case that are going to be
7 received into evidence and I'm not going to
8 carry them around to go up with the record.
9 Certainly if somebody at the Commission wants
10 to see these DVDs I'm sure that you can get
11 them up to them. But I don't want the record
12 being burdened with it.

13 And it's not to demean the
14 programming. Please understand me. It's just
15 that I can't handle DVDs in the context of
16 this case.

17 (Whereupon, the above-referred to
18 documents were marked for
19 identification as WealthTV
20 Exhibits Nos. 17 and 18, and
21 withdrawn from evidence.)

22 So now we're up to 16, 17, 18.

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1 Number 19. We did 19?

2 MR. COHEN: We did 19 and it's on
3 reserve.

4 JUDGE SIPPEL: Okay.

5 MR. COHEN: On 20, Your Honor, we
6 had objected of this picture not being
7 representative and it seems to me that
8 understanding your ruling on 6 to 11 I assume
9 you're going to overrule our objection. But
10 we do have an objection on it.

11 JUDGE SIPPEL: Let me see what it
12 is. This is number what?

13 MR. COHEN: Twenty.

14 JUDGE SIPPEL: This says
15 WealthTV's Envy. Oh my God. Do we need that?
16 Do we really need that?

17 MR. COHEN: I've made the
18 argument, Your Honor. You can be sure that
19 the programming as a whole does not represent,
20 is not represented in this picture. So it is
21 prejudicial.

22 MR. FELD: It's not a very

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1 attractive picture, Your Honor, but the point
2 is that this is not intended to appeal to
3 women.

4 JUDGE SIPPEL: It's what?

5 MR. FELD: It's not intended to
6 appeal to women. It's a shot from --

7 JUDGE SIPPEL: I see. Now you've
8 got me in a tough spot here. I'll tell you
9 what. I've never seen this one in Germany.

10 (Laughter.)

11 Maybe I don't go to the right
12 places. I'm not saying it doesn't exist
13 there, but it's not on the front page of Das
14 Bild. All right. I'm just going to reject
15 that. You can keep it in the record if you
16 want as an improperly rejected exhibit, but I
17 just find it so distasteful and I know what
18 you're getting at. I know what you're talking
19 about. But can I take judicial notice that
20 that would not appeal to women very much? I
21 don't even know that. So what can I say?

22 (Whereupon, the above-referred to

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1 document was marked for
2 identification as WealthTV Exhibit
3 No. 20, and rejected from
4 evidence.)

5 MR. COHEN: I'm at a loss, Your
6 Honor.

7 JUDGE SIPPEL: It's the first time
8 today.

9 MR. SCHONMAN: Your Honor, is your
10 ruling that it's not received? Yes, I'm
11 rejecting it.

12 MS. WALLMAN: And, Your Honor, the
13 grounds?

14 JUDGE SIPPEL: The grounds for
15 rejecting, I'm rejecting it under -- Let me
16 see. I have the right number. Excuse me
17 while I go to my numbering copy of the Rules
18 of Evidence, 403 even though it might be
19 relevant. Okay.

20 MR. SCHONMAN: Your Honor, would
21 this be cumulative since I think you've
22 already received Exhibit 10?

1 JUDGE SIPPEL: Yes, cumulative and
2 I mean as I say that's what it is. It will be
3 marked for identification and it can go up on
4 appeal, but it's not going to be used in this
5 courtroom. Okay. Let's go.

6 MR. COHEN: Twenty-one, Your
7 Honor, is one of the ones you reserved.

8 JUDGE SIPPEL: That's being
9 reserved, yes.

10 MR. COHEN: Twenty-two, Your
11 Honor, we have a hearsay objection. Again,
12 this is the same fundamental point. Mr.
13 Herring is not competent as a witness to
14 sponsor In DEMAND press releases. I mean it's
15 just a newspaper article or I guess it's a
16 press release.

17 JUDGE SIPPEL: Who wants to speak
18 to this on the other side?

19 MR. ROSE: It's a statement by In
20 DEMAND, Your Honor. Press releases are
21 fundamentally different from a report. Is
22 that what somebody said? It's a statement by

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1 the company. I don't think anyone is
2 disputing the issue of this press release.
3 There are number of them.

4 The Herrings in fact do look at
5 the press releases in the course of their
6 business in figuring out what their
7 competitors are doing and what's going on. In
8 fact, he found out that Mojo was being
9 launched from a press release and that was the
10 seed for this hearing. It's an important
11 source of information to him. His testimony
12 relies on information he found out from press
13 releases and I don't think the reliability is
14 defense of it. It's not really disputed that
15 he did.

16 JUDGE SIPPEL: Isn't this a -- I'm
17 going to ask Mr. Cohen. Isn't this a business
18 record?

19 MR. COHEN: But not of a party,
20 Your Honor.

21 JUDGE SIPPEL: No?

22 MR. COHEN: No.

1 JUDGE SIPPEL: Who prepared it?

2 MR. COHEN: In DEMAND. In Demand
3 is not a party. This is our fundamental issue
4 that we're having. We're not objecting to
5 business records of Time Warner or Comcast or
6 Cox or Bright House. In DEMAND is not a
7 party. They're not represented.

8 JUDGE SIPPEL: All right. I
9 understand that. But In DEMAND is constituted
10 on the four Defendants. Isn't that correct?

11 MR. COHEN: That does not -- There
12 is case law on this and it's actually
13 addressed in our in limine motion. There's a
14 Supreme Court on this.

15 JUDGE SIPPEL: Yes.

16 MR. COHEN: Which says that unless
17 you can demonstrate an agency relationship the
18 fact that you have a minority ownership
19 interest in company does not make that company
20 the same as the shareholder for the purposes
21 of the rules of evidence.

22 JUDGE SIPPEL: Well, I understand

1 Mr. Beckner said that they had a five percent
2 interest.

3 MR. COHEN: Yes.

4 JUDGE SIPPEL: And I thought that
5 between all of you you had 100 percent.

6 MR. COHEN: We do, Your Honor.
7 But not anyone is In DEMAND. In DEMAND has a
8 board of directors. In DEMAND has management.
9 One of the senior managers of In DEMAND is
10 going to be here to testify. He could be
11 cross examined about In DEMAND documents. But
12 they don't come in as admissions.

13 JUDGE SIPPEL: I didn't say it was
14 coming in as an admission. I said it was a
15 business record.

16 MR. COHEN: Well, I think, Your
17 Honor, the hearsay -- for the hearsay
18 exception for business records you applied, as
19 I understand it, it has to be a business
20 record of a party, not a business record of a

21 --

22 JUDGE SIPPEL: You're right. I'm

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1 bending that. I would be bending that a bit
2 and I want to see the Supreme Court decision
3 before I rule that this is exactly what they
4 were intending. But I'm not going to -- Don't
5 get it for me because I'm going to read it.

6 MR. ROSE: Your Honor, if I may
7 address that issue.

8 JUDGE SIPPEL: Yes, sir.

9 MR. ROSE: The question of hearsay
10 in an administrative proceeding as we said
11 towards the beginning of this FCC proceedings,
12 the DC Circuit said itself hearsay is allowed.
13 The rules should be relaxed. This is not an
14 admission of a party opponent. To the extent
15 it's a business record, it's a business record
16 of Mr. Herring.

17 In DEMAND is a consortium. We're
18 saying that we believe the Defendants acted in
19 concert in many ways because of their interest
20 in In DEMAND, but In DEMAND is a legally
21 separate entity. We're not going to dispute
22 that point. It's an affiliate within the

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1 meaning of the rules I believe Mr. Feld was
2 levying.

3 MR. FELD: Yes, there is a
4 fundamental justice issue as noted in the FCC
5 Rules with regard to any -- which is because
6 of the nature of the statute and the
7 regulation we cannot call In DEMAND as a
8 party. The parties for the purposes of this
9 case are the four Defendants who are
10 affiliated as is agreed with the programming
11 producer with the programming and by law we
12 can't call In DEMAND.

13 Now this puts us in the situation
14 where we have here something that was issued
15 by In DEMAND and is publicly available. Its
16 purpose is to explain as Mr. Herring will set
17 forth again why he thinks the facts of the
18 case are available. It is a sort of empty
19 formalism to say "Well, In DEMAND is not
20 here." So he's not competent to read a press
21 release that they issued which everybody in
22 the business would have read and which was the

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1 basis for the actions in which he will test
2 when it is especially difficult for us when we
3 could never attach In DEMAND as a party
4 because the statute directs the behavior to
5 carriers who refuse to bury or otherwise
6 disadvantage independence in favor of
7 affiliated programming.

8 JUDGE SIPPEL: Right.

9 MR. FELD: And therefore I would
10 say we don't think it's hearsay. We think it
11 falls into the exceptions to the extent that
12 it is hearsay. You're allowed to include it
13 and you should include it particularly since
14 the purpose that we have it for is
15 foundational for the witness. It's not -- In
16 the interest of justice, to the extent that
17 it's hearsay, the interest of justice is
18 defined by the FCC rules and past precedent
19 with regarding to this is an FCC hearing says
20 it meant.

21 MR. ROSE: There is another rule
22 of evidence I would like to cite, Your Honor,

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1 if I may, 803.17, the Exception for Market
2 Reports and Commercial Publications can only
3 be relied on in the industry. Mr. Herring
4 will testify that he does rely on these kinds
5 of press releases engaging what's going on in
6 the industry.

7 MR. COHEN: Your Honor, can I
8 respond to a couple points? 803.17 has
9 nothing to do with this. 803.17 is how you
10 get in Dow Jones reports and if we were to
11 brief the question of what comes in under
12 803.17 and what doesn't come in under 803.17
13 I'm quite confident and no case has been cited
14 that we're going to find press releases.

15 Now what Mr. Feld referred to as a
16 empty formalism, I view as the Rules of
17 Evidence and we understand that you have some
18 discretion. But this is the first in what's
19 going to be a series of arguments we're going
20 to have on the exhibits in which they're
21 basically saying "Throw the baby out with the
22 bath water. It's fair."

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1 Mr. Rose just said it was Mr.
2 Herring's business record. It can't be Mr.
3 Herring's business record because he read it
4 and put it in his file. I mean we just can't
5 let in all sorts of hearsay just because it's
6 something that he read. He can say that he
7 read it and that's what caused him to act, but
8 that doesn't make the document admissible and
9 we should not have a rule here in which every
10 time we come to something that everyone says
11 is hearsay the answer is "Well, you can relax
12 the rules." You can relax the rules, but I
13 don't think the precedent instructs you to
14 throw out the rules.

15 And what we're going to have here
16 is a series of requests saying, "It's not
17 fair. It's in the interest. Just let it in.
18 He read it and it's foundational." We have
19 Rules of Evidence and hearsay rules we're
20 supposed to apply and we do understand that
21 Your Honor has some discretion. But we're not
22 giving up the hearsay rule entirely as far as

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1 we understand.

2 MR. MILLS: If I can answer that,
3 the case that Mr. Rose is talking about, the
4 Echo Star case, I believe that was agency fact
5 finding in general, not an administrative law
6 hearing where the FCC Rules make clear that
7 the Rules of Evidence are supposed to
8 followed.

9 I understand there's some leniency
10 but that does not mean that you throw out as
11 Mr. Cohen has pointed out. That was a
12 decision about whether substantial evidence
13 can include hearsay and agency fact finding
14 generally, not an administrative law hearing
15 which is supposed to be guided by the Rules of
16 Evidence.

17 JUDGE SIPPEL: What's the cite on
18 that case?

19 MR. MILLS: That was the Echo Star
20 case.

21 MR. ROSE: Your Honor, there are
22 several that we've cited. In the surrebuttal,

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1 we've cited the Echo Star which is 292.3749.
2 There were also some hearing opinions we've
3 cited in the opposition brief. They all go
4 back to a case called Johnson from DC Circuit
5 saying essentially that the rules can be
6 relaxed and certain kinds of hearsay can be
7 admitted. It's essentially discretionary.

8 JUDGE SIPPEL: Well, I understand
9 that. I mean I know that doctrine and all and
10 it's under basically an APA interpretation.
11 But I think we do have a -- Mr. Cohen is
12 right. We have a defined road, a specific
13 rule, rather at the FCC that says that we do
14 follow the Federal Rules with obviously some
15 discretion to make exceptions. But the
16 Commission's policy is to follow the Federal
17 Rules at least as a starting point which I try
18 to do.

19 I also as a better way to keep
20 things clean and have specific reasons for why
21 rulings are made instead of going with that
22 "Well, we'll let it in for what it's worth."

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1 MR. ROSE: But the specific nature
2 of these documents because it's not exactly
3 analogous but it's sort of like another job
4 applicant representing what his credentials
5 are. It's another network representing what
6 its business is, what kind of programming it
7 has, what it's doing.

8 The decision makers look at it
9 when they're deciding whom to carry. They're
10 going to look at what's going on with the
11 networks. They're going to look at the
12 pitches. They're going to look at the press
13 reports. It's the sort of thing that's
14 considered in these sorts of decisions as a
15 point.

16 JUDGE SIPPEL: All right. I've
17 heard enough on it. Mr. Schonman, do you want
18 to weigh in on this at all?

19 MR. SCHONMAN: Your Honor, the
20 only thing I have to say about this is that
21 Mr. Herring probably cannot testify about the
22 truth of the matter asserted in this document.

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1 But to the extent he read it and formed
2 opinions about whether the items in it were
3 accurate or true, he can certainly testify
4 about his beliefs and his motivations after
5 having read it if they affected him.

6 Because he believed the matters
7 were true and accurate, he can testify about
8 that. Whether in fact the matters are true
9 and accurate as stated in this document is not
10 something he can testify to. It's not his
11 document.

12 JUDGE SIPPEL: Well, that is well
13 stated. I am going to deny the motion -- I'm
14 going to grant the motion to offered this into
15 evidence.

16 (Whereupon, the above-referred to
17 document was marked for
18 identification as WealthTV Exhibit
19 No. 22, and received in evidence.)

20 It's going to come in as a
21 business record of In DEMAND and I think
22 there's enough of a connection despite what

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1 has been argued to me for purposes of a case
2 like this. It certainly is not going to be
3 taken -- It's not being received for the truth
4 of the matter stated there and it's only going
5 to be received as a document which came out
6 of, you know, which was issued on July 31,
7 2007. I think that's within a relative time
8 frame. Is that the time frame that we're
9 talking about?

10 MR. ROSE: The application has
11 been an ongoing process, Your Honor. So, yes.

12 JUDGE SIPPEL: Since when?

13 MR. ROSE: I believe 2004.

14 JUDGE SIPPEL: Enough of an
15 overlap. Okay. It has its limits. It has
16 serious limits to it, but I'm going to -- It
17 also has the element of reliability and I
18 don't think that they would be out a press
19 release that's deliberately false and
20 misleading.

21 All right. I'm going to receive
22 it. Next one.

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1 MR. COHEN: Twenty-six, Your
2 Honor, which is a --

3 JUDGE SIPPEL: What about 24? Did
4 I already rule on 24 and 25?

5 MR. COHEN: I'm sorry. Excuse me.
6 My apologies. Twenty-four, we have no --

7 MR. FELD: Twenty-three.

8 MR. COHEN: Twenty-three, we have
9 no objection.

10 JUDGE SIPPEL: Okay. Twenty-three
11 no objection. Good.

12 MR. COHEN: Twenty-four, yes.
13 Your Honor, 24 we actually don't understand
14 what this document purports to be and how it
15 was created.

16 JUDGE SIPPEL: All right. Let me
17 just say that 23 is identified and received
18 into evidence as WealthTV No. 23.

19 (Whereupon, the above-referred to
20 document was marked for
21 identification as WealthTV
22 Exhibit No. 23, and received in

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1 evidence.)

2 JUDGE SIPPEL: Now 24 is
3 different.

4 MR. COHEN: We have both a hearsay
5 and a foundational argument. This appears to
6 be somebody's calculation as to what Mojo
7 affiliate fees were paid by the Defendants.

8 JUDGE SIPPEL: It's not your
9 document.

10 MR. COHEN: It's not our document
11 and it was obviously created and this is
12 another example of Mr. Herring converts. So
13 now he's a damages expert.

14 JUDGE SIPPEL: All right. Let me
15 ask the question. Who prepared the document?

16 MR. ROSE: This is another summary
17 by Mr. Herring, Your Honor. We believe it's
18 in the nature of 15, 19, 21, 25.

19 MR. COHEN: Quite different, Your
20 Honor.

21 JUDGE SIPPEL: Okay, and your
22 experts had nothing to do with this. This is

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1 all coming out of Mr. Herring.

2 MR. ROSE: Yes, Your Honor.

3 JUDGE SIPPEL: All right. I am
4 going to -- Again, this is 24, right?

5 MS. WALLMAN: Yes.

6 JUDGE SIPPEL: I'm going to keep
7 this. What was the other category I was
8 doing? I'm going to reserve ruling on this.

9 (Whereupon, the document referred
10 to was marked as WealthTV Exhibit
11 No. 24 for identification.)

12 If you want to show Mr. Herring
13 what it is and how he put it together I'll
14 listen to that up to a point. But he's going
15 to have to convince me that this is reliable
16 for what it's worth. I'm not letting him
17 offer an opinion on it. Basically, this is a
18 Bob Cratchit document. He sat down and he did
19 it. If he did it accurately and if it has
20 relevant information, we'll take it. If we're
21 attacking credibility of the document, then
22 that's a question.

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1 But this is no opinion to me.
2 This is not an opinion. It's either right or
3 wrong and reliable or unreliable. So I'm
4 reserving 24.

5 Twenty-five.

6 MR. COHEN: Twenty-five was in the
7 category you reserved already, Your Honor.

8 JUDGE SIPPEL: All right. Let's
9 do 25 in the reserved.

10 Twenty-six.

11 MR. COHEN: Twenty-six is another
12 example of this is a greatest hits document.
13 There are snippets of hearsay, multichannel
14 news, broadcasting. This is --

15 JUDGE SIPPEL: Who did it?

16 MR. COHEN: I assume Mr. Herring
17 did it.

18 MR. ROSE: Mr. Herring.

19 JUDGE SIPPEL: Mr. Herring did
20 this.

21 MR. COHEN: I mean now he's
22 picking and choosing quotes from articles.

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1 This isn't evidence. So I have hearsay, best
2 evidence. I have lots of objections to this
3 one.

4 JUDGE SIPPEL: All right. Well,
5 what number is this again?

6 MR. COHEN: Twenty-six, Your
7 Honor.

8 JUDGE SIPPEL: Twenty-six.

9 MS. WALLMAN: Your Honor, can I
10 just point out.

11 JUDGE SIPPEL: Go ahead, Ms.
12 Wallman.

13 MS. WALLMAN: Several of the
14 references here are to In DEMAND press
15 releases and your prior ruling on the Mojo
16 press release may be informative to you here.
17 For example, the second block was taken from
18 a June 14th In DEMAND press release that was
19 released via Business Wire, a service net
20 company used to propagate their press
21 releases.

22 JUDGE SIPPEL: Well, even if we

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1 were going to get into this, there would have
2 be -- He would have to be in a position to
3 come up with the actual press release for
4 comparison purposes and again I think that-Mr.
5 Cohen described these best as being snippets.
6 The other one was a bonafide press release
7 that comes out in the normal course of
8 business. This document doesn't come out in
9 the normal course of anybody's business.

10 MS. WALLMAN: Well, we certainly
11 could supply the full press release.

12 JUDGE SIPPEL: That's what I'm
13 trying to -- That's exactly the point. I mean
14 we don't want to get into using this as a
15 device to bring other evidence in and take
16 more time. The way this has been prepared and
17 presented to me I'm going to reject it as
18 being unreliable.

19 (Whereupon, the above-referred to
20 document was marked for
21 identification as WealthTV Exhibit
22 No. 26, and rejected from

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